IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 230

H. K. PORTER COMPANY, INC.
DISSTON DIVISION—DANVILLE WORKS,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
AND
UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR UNITED STEELWORKERS OF AMERICA

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COUNTERSTATEMENT OF THE CASE

The NLRB's order, challenged here, was designed to cure a bizarre course of illegal conduct. Petitioner's Statement of the Case describes that conduct only superficially. We believe a more detailed statement is necessary. The relevant facts are undisputed.

On October 5, 1961, following a secret ballot election, United Steelworkers of America ("the Union") was certified by the NLRB as exclusive bargaining agent of the production and maintenance employees at the Danville, Virginia plant of H. K. Porter Co. ("the Company"). After five years of negotiations, the Union still had not ob-

tained a first agreement. Throughout those negotiations, the Company bargained in bad faith. Its trail of misconduct was traced in a series of legal proceedings, culminating in the order now before this Court.

1. The First Unfair Labor Practice Proceeding

The "bargaining" which took place between the certification date (October 5, 1961) and November 27, 1962, was the subject of the first unfair labor practice proceeding. In that case, a Trial Examiner of the Board found that the Company had violated Section 8(a) (5) and (1) of the Act by failing to bargain in good faith. The Company had made unilateral changes in terms and conditions of employment, and had insisted upon a no-strike clause while simultaneously refusing to grant any form of contractual machinery for resolving grievances. The Trial Examiner concluded that the Company "was demanding in effect that the Union relinquish the basic rights conferred by the Act or it would not receive a contract" and that the Company's actions were designed to "subvert the Union's position as the statutory representative." (App. 45-46; Trial Examiner's Decision in *H. K. Porter Co.*, 5-CA-2344).

The Examiner ordered the Company to bargain in good faith. The Company did not file any exceptions; accordingly, the Examiner's ruling automatically was adopted by the Board, and the Board's order, in turn, was enforced by the U.S. Court of Appeals for the Fourth Circuit (App. 41, 58).

During the pendency of the first Board proceeding, a period of nearly a year, the Company refused to meet with the Union at all (App. 116, 17-18).[1] However, after the Examiner's decision issued, it agreed to resume negotiations (App. 18). Twenty-one negotiating sessions ensued during

[1] There were no negotiations between November 27, 1962 and September 23, 1963 (App. 42, 45-46).

the next year, and these became the subject of the second unfair labor practice proceding (App. 46, 116).

2. The Second Unfair Labor Practice Proceeding

When the parties resumed their negotiations in September, 1963, there were 14 issues in dispute. As of the last meeting in September, 1964, the differences had been narrowed to three unresolved issues—dues checkoff, insurance and wages (App. 46-47, 116-117). Ten of the other issues had been "resolved" by the Union withdrawing its demands (App. 61, 116-117).[2] The eleventh was resolved by the Company making its only movement. Even this one step was not voluntary. As noted, the Examiner in the first case had held that it was an unfair labor practice for the Company to insist upon a no-strike clause while coupling that position with a refusal to agree to any contractual machinery for resolving grievances. The Company did not challenge that decision, and thus became legally obligated to comply with it either by agreeing to some form of grievance-arbitration or by dropping its demand for a no-strike clause. The Company ultimately complied by withdrawing its demand for a no-strike clause. This single act of accommodation did not come easily for the Company. As explained by the court below: "In spite of the Board's order in the prior proceeding, it was not until ten months and 20 bargaining sessions following its issuance that the Company receded from the position which the Board had found to amount to an unfair labor practice" (App. 60).

While this delay itself evidenced the Company's continuing bad faith, the second Board proceeding focused primarily upon another aspect of the bargaining. Throughout the negotiations a key issue at virtually every session had

[2] As the Union's negotiator testified, "In the hopes of getting an agreement, the Union gradually held twenty meetings, and dropped all those demands . . ." (App. 61).

been the Union's request for the "checkoff"—the deduction by the Company of union dues from the wages of employees who voluntarily authorized such deductions in writing (App. 47, 21).

The Union's demand for such a provision was addressed to its own self-preservation. The Union maintains no office or fulltime staff representative in Danville and the plant would be serviced from the Steelworkers' Roanoke office situated 85 miles away. The 300 bargaining unit employees reside in homes scattered over a 40 mile radius from the plant. Thus, absent a systematic method of dues checkoff, the Union was faced with an insurmountable practical problem in attempting to collect dues from these employees (App. 45, 61, 22-24).

The Company steadfastly rejected the Union's checkoff demand at every negotiating meeting. The Company gave only one reason at the bargaining table for its refusal—that collecting dues "was the Union's business which [the Company] should not foster or promote" (App. 47, 30-32). At the unfair labor practice hearing, with uncommon candor, the Company explained what it meant by "Union business." Its counsel explained that "our purpose was that we were not going to aid and comfort the International Union at this location" (App. 36).[3] He elaborated:

> "[W]e have stated our purpose; we have stated it plainly here many times, that we were not going to aid and comfort the Union . . ." (App. 37).

He acknowledged that "our refusal to grant the checkoff clause has been harassment of the International Union" (App. 16). When advised by the Trial Examiner that the most that could be ordered would be further bargaining, and "that doesn't mean that you have to agree to it," counsel

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[3] The plant manager, who was the Company's chief negotiator, likewise testified that "the reason for refusing to grant checkoff" was that he was "not going to aid and comfort the Union . . ." (App. 32).

responded: "So we bargain for another 20 or 200 or 400 meetings ——" (App. 39).

The Company admitted at the hearing that it had absolutely no reason for resisting the checkoff except its desire not to give "aid and comfort" to the Union (App. 30, 31, 32, 36, 37). The plant manager testified that there would be no administrative inconvenience involved in checking off dues, that there was no company-wide policy against the dues checkoff and that, in fact, it did check off union dues at some of its other plants (App. 47-48, 30, 33).[4] He further testified that at *this* plant the Company made deductions from employees' wages, pursuant to voluntary authorizations, for a variety of other purposes (App. 48, 26-29).[5]

The Trial Examiner found that the Company was negotiating in bad faith (App. 48-51). He concluded from "the entire record" that "Plant Manager Jones, Respondent's chief negotiator, took the position he did with respect to the checkoff issue, for the purpose of frustrating agreement with the Union" (App. 49). He likewise condemned the Company's asserted refusal to give "aid and comfort" to the Union as, "if not actually a false reason," inconsistent with good faith (App. 50).

The Examiner recommended an order which simply directed the Company—as had the order in the prior case—to bargain in good faith (App. 52-54). The Examiner explained that his decision did not mean that "in the resumed

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[4] The checkoff is now such an accepted practice in labor-management relations that it is included in 92% of all contracts in manufacturing industries (B.N.A., Collective Bargaining Negotiations and Contracts, page 87:3).

[5] Until the advent of the Union, the Company checked off weekly contributions to a "Good Neighbor Fund," administered by an informal employee organization for parties, charitable donations and gifts to hospitalized employees (App. 26). The Company also made deductions for the purchase of U.S. Savings Bonds, the purchase of optional insurance coverage for employees' dependents, and contributions to the United Fund (App. 26-27).

bargaining sessions which I shall recommend, Respondent will be required to agree to some form of checkoff. I only find and conclude that on that issue Respondent did not heretofore bargain in good faith, and that it should be required to do so. If after such good faith bargaining the parties reach an . . . impasse, the requirements of the Act will have been fulfilled" (App. 51, n. 9).

The General Counsel and the Union both filed exceptions to the decision, contending that the special circumstances of this case warranted an order requiring the Company to agree to the checkoff. The Board, however, affirmed without discussion (App. 55-56).

3. The First Decision of the Court Below

In its first decision, the court below enforced the Board's order, Judge Miller dissenting (App. 57-67). The court held that the Board's finding of a purpose to frustrate agreement was supported by substantial evidence. The court further found, as contended by the Union, that "it is clear from the record that the company had no reason, other than to frustrate the bargaining procedure, to refuse to accept the dues check-off" (App. 66). Nevertheless, the court did not adopt the Union's request that the Board's order be modified to include "a provision requiring the company to withdraw its objection to the dues check-off" (App. 64).

The court acknowledged that "the prior order of the Board, drawn, as is the order in suit here, in terms of the statute, requiring the company to bargain in good faith, was ineffective (App. 63-64), and it agreed that "certainly a succession of Section 10(b) proceedings resulting in Board orders cast in statutory language is not the answer where the refusal to bargain persists" (App. 64). But the court believed that modification of the Board's order was "not necessary" (App. 66), as in the circumstances of this case good faith required acquiescence:

"To suggest that in further bargaining the company may refuse a check-off for some other reason, not heretofore advanced, makes a mockery of the collective bargaining required by the statute." (App. 66-67, n. 16).[6]

To make clear its intention, the court directed that the Trial Examiner's statement that the order does not require the Company to agree "should be disregarded" (App. 67, n. 16).

4. Events Following the First Decision of the Court Below

The Company moved for a stay of the mandate so that it could seek review from this Court. In support of its motion the Company stated that "the effect of the opinion and order of the court is to require the Company to agree to a dues checkoff provision. This, the Company contends, would be most unfair . . ." (App. 83).

The Company's petition for a writ of certiorari (No. 352, October Term, 1966), sought review of both the finding of violation and the propriety of the remedy. As to the latter, it argued that the opinion of the court below was "indirectly compelling" it to agree to a checkoff clause in contravention of Section 8(d) (Petition, page 17). This Court denied the petition on October 10, 1966 (385 U.S. 851).

Thereafter the Company and the Union met. It was now more than five years since the certification of the Union. The Company, despite having told the court below and this Court that the order compelled it to agree to a checkoff, had a different version when it met with the Union:

"It is our position that the court order requires us to bargain with the Union in good faith in an attempt

[6] Footnote 16 of the court's opinion is printed incorrectly in the appendix and our quote is taken from the correct version appearing at 363 F. 2d 272, 276.

to establish a system of dues collection at the plant which is acceptable to both the Company and the Union. The Company will not be coerced into making an outright gift of a dues check-off provision simply because the Union thinks that the court has ordered us to do so. That, in our view, is not bargaining" (App. 89).[7]

The Union thereupon filed a motion in the court below for clarification of its decree. The Union explained that it understood the court's decree to require the Company's agreement to checkoff; that the Company had indicated the same understanding of the decree until it actually met with the Union; but that at that meeting the Company announced a different understanding, as expressed in the above quote (App. 81-87). The court below denied the motion on the ground that "a contempt proceeding, rather than proceedings in connection with a motion to clarify the decree, would be more appropriate to test the Company's compliance with the decree" (App. 109-110).

Accordingly, the Union requested that the Board initiate contempt proceedings (App. 110).[8] The Board declined to do so, and instead advised the Union that it was closing the case because the Company had "satisfactorily complied with the affirmative requirements of the order" (App. 111).

The Union thereupon filed another motion in the court below seeking clarification of its decree. The motion stated that the Board, by closing the case, had adopted the Com-

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[7] The only objection to checkoff voiced by the Company when the parties met was that dues collection was "Union business." (App. 84). This, of course, was the same objection which it had advanced during the prior period involved in the Board proceeding. The Board had found that this reason, "if not actually . . . false," evidenced an attitude inconsistent with good faith (App. 50).

[8] Under the Act, only the Board may initiate contempt proceedings. *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261.

pany's interpretation of the decree, and that there remained no other avenue by which the Union could adjudicate its claim that the decree required the Company to agree to a checkoff. This time, the motion met with a better fate.

5. The Second Decision of the Court Below

The Court (Judge Miller dissenting) granted the motion, clarified its decree, expressed its views on what powers were available to the Board when confronted with continuing refusals to negotiate in good faith, and remanded the case to the Board "for reconsideration in the light of this opinion" (App. 115-130).

Most pertinently, the court below stated that the Board could, in appropriate circumstances, order a party to make a concession to remedy a refusal to bargain, notwithstanding Section 8(d) of the Act. The court explained that Section 8(d) "relates to the determination of *whether* a Section 8(a)(5) violation has occurred and not to the *scope* of the remedy which may be necessary to cure violations which have already occurred." (App. 122-123; emphasis in original).

The court recognized that the Act "is grounded on the premise of freedom of contract" and that "remedies which impinge on it are not to be casually undertaken" (App. 124). But the court concluded that such remedies may be provided when, on balance, they effectuate the policies of the Act in its entirety:

> "[A]n equally important policy of the Act is to equalize the bargaining power of employees and employers by assuring and guaranteeing the right of workers to organize and bargain collectively through their elected representatives, and the major purpose behind the Section (8)(a)(5) duty to bargain is to make meaningful this fundamental right of employees . . . To make sure that this primary right is fulfilled, the NLRB has

been given broad remedial powers. Section 10(c) of the Act charges the Board with the task 'of devising remedies to effectuate the policies of the Act' . . . Where, in a particular case, two policies of the Act conflict, the Board must seek to devise remedies which will best effectuate the one at least cost to the other. Though ordering an employer to grant a checkoff obviously intrudes on freedom of contract, it may, in certain instances, be the only way to guarantee the workers' right to bargain collectively." (App. 124-127).

6. The Board's Decision on Remand

On remand, the Board issued a Supplemental Decision and Order directing the Company to "Grant to the Union a contract clause providing for the checkoff of union dues" (App. 132-137). The Board noted its prior finding "that the real and only reason for refusing the checkoff was to 'frustrate agreement with the Union' " (App. 133). It concluded:

> "As respondent has repeatedly violated Section 8(a)(5) and admittedly had no reason for opposing the checkoff, and as its only reason for such opposition was to frustrate agreement with the Union, we conclude . . . that an order to grant checkoff is warranted in the circumstances of this case. To permit Respondent to hold out for some 'reasonable concession' by the Union in return for the checkoff requirement would imply that the Respondent is now being ordered to surrender a position that it had legitimately maintained. Such an implication would be contrary to our finding, affirmed by the Court of Appeals, that Respondent's opposition to granting checkoff was based solely on a desire to thwart the consummation of a collective bargaining agreement." (App. 135).

The Board's new order was enforced by the court below

per curiam (Judge Miller dissenting) (App. 141). This Court granted the Company's petition for writ of certiorari (App. 142).

7. The Collective Bargaining Relationship Subsequent to October, 1966

The record in this case contains no evidence relating to the parties' relationship subsequent to October, 1966. Petitioner, however, has gone outside the record to advise this Court that agreements have been reached (brief, page 8). Accordingly, we feel compelled to add that those agreements were made possible only because of the pendency of this litigation.

The Company has never receded from its position that, unless coerced by a judicial decree, it will not grant a checkoff. The first agreement—effective December 1, 1966—was made possible because the Union reserved for itself on the face thereof the right to pursue its claim in this litigation. The three year agreement dated May 1, 1969, was achieved, after a strike, when the Company agreed to a checkoff provision which would become effective "if after exhaustion by the Company of all available legal remedies the order of the National Labor Relations Board requiring the Company to grant the Union a provision for checking off union dues becomes final."

In other words the Union, able to look to this litigation for vindication of its claim, had opted to forego the checkoff *pendente lite* and thereby had deprived the Company of the ability to forestall agreement by its continuing intransigence on this issue.

COUNTER-STATEMENT OF THE ISSUES PRESENTED

The Union believes that there are two questions presented by this appeal:

1. Does the National Labor Relations Board have

the power, in appropriate circumstances, to remedy a statutory violation by requiring the wrongdoer to make a contractual concession?

2. Where an employer acknowledges that it has no lawful objection to a union proposal, does a Board order requiring him to accede to that proposal exact a "concession" within the meaning of Section 8(d) of the Act?

SUMMARY OF ARGUMENT

I

The principal issue in this case is whether the Board is totally devoid of power to remedy a violation by exacting concessions or imposing agreement, no matter how appropriate that remedy may appear in the circumstances of a particular case. The Company contends that Section 8(d) deprives the Board of such power. As we show, this contention is erroneous.

Section 8(d) states that the duty to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession." It was enacted to prevent the Board from passing judgment upon the *substance* of an employer's bargaining position, so long as that position is maintained with subjective good faith. In the present case, it is clear that the Board did not transgress Section 8(d) *in finding the violation*. The Board found a violation because the Company was bargaining with subjective bad faith, i.e., with a state of mind designed to frustrate reaching agreement.

The Company seeks here to have Section 8(d) serve an entirely different purpose. It argues that Section 8(d) applies not only to the finding of violations, but also to the fashioning of remedies. The Company admits that the literal language of Section 8(d) is not addressed to the remedy power. Nor is there a word in the legislative his-

tory, or in the decisions of this Court, which suggests such a secondary purpose for Section 8(d). Nevertheless, the Company argues that Section 8(d) expresses a "policy of freedom of contract"; that Section 10(c) authorizes only such remedies "as will effectuate the policies of this Act"; and that, accordingly, the Board may not compel concessions or agreement to remedy violations.

It is questionable whether Section 8(d) expresses any "policy" relevant to the remedy power. To be sure, Section 8(d) expresses a policy that employers negotiating *in good faith* are to enjoy "freedom of contract," and are not to have their *bona fides* challenged by reason of their unwillingness to make concessions or agreement. That is quite different, however, from concluding that Section 8(d) also expresses a policy of insulating employers negotiating *in bad faith* from remedies designed to cure their wrongs.

But even if the policy of "freedom of contract" relates to remedies as well as findings of bad faith, the Board's power to issue the remedy here should be sustained. For this policy, even if relevant, is not entitled to exclusive weight; it is but one of the several policies which must be accommodated in fashioning remedies to the particular facts of each case. "[I]t is the entire Act and not merely one portion of it, which embodies 'the definitive statement of national policy.'" *Machinists' Local* v. *NLRB*, 363 U.S. 411, 418 n. 7. To the extent that a "tension" exists between competing policies, the Board in fashioning remedies is required "to give coordinated effect to the[se] policies . . ." *NLRB* v. *Seven-Up Bottling Co.*, U.S. 344, 348, and in so doing has the power to subordinate one policy to another. In implementing "the entire Act" this Court has frequently approved Board remedies which conflict with one of the Act's specific policies. For example, no policy of this Act is clearer than that an employer may not grant exclusive recognition to a minority union, *Garment Workers* v. *NLRB*, 361 U.S. 731, 737, yet this Court repeatedly has

affirmed the Board's power to *remedy violations* by ordering bargaining with a minority union. E.g., *Franks Bros. Co.* v. *NLRB*, 321 U.S. 702; *NLRB* v. *Gissell Packing Co.*, 395 U.S. 575. And more directly in point, this Court and the courts of appeals have consistently upheld Board remedies which exact concessions or impose agreement upon non-consenting employers. (These cases are discussed in detail *infra*, pp. 25-32). Moreover, in implementing the identical statutory policies under Section 301, this Court has subordinated "freedom of contract" to other policies of the Act where, on balance, that course was deemed appropriate, *John Wiley & Sons* v. *Livingston*, 376 U.S. 543. Thus, the instant case is not the innovation which the Company tries to make it.

II

The Company has confined its argument solely to the claim that the Board may *never* exact concessions or impose agreement. It does not contend that, if such power exists, this was an inappropriate case for its exercise. The Company's reluctance is not surprising. The Board was confronted with an employer: (a) who was a recidivist, having twice refused to bargain during its first negotiations with the Union; (b) who admitted that it had no reason for refusing the Union's request for a checkoff except for its illegal purpose of frustrating any agreement with the Union; (c) who nevertheless, in response to the Board's second order to bargain, continued to refuse the request without tendering any lawful reason for its refusal. In these circumstances, the Board was warranted in concluding that an order requiring checkoff was essential to effectuate the policies of the Act and conversely that the failure to do so would have rendered the remedial provisions of the Act totally meaningless.

The Company, and the Chamber of Commerce, *amicus curiae*, raise the spectre that however appropriate the remedy in the circumstances of *this* case, its approval by this

Court will portend "contract writing" as a remedy to be imposed generally in run-of-the-mill refusal to bargain cases. This fear is unwarranted. The Board's power under Section 10(c) is broad, but it is not unlimited. The Board may not impose remedies which are "punitive," or which are "arbitrary, unreasonable or capricious." These limitations effectively assure that, in remedying run-of-the-mill refusals to bargain, the Board cannot dictate the terms of collective bargaining agreements. For example, the employer who violates Section 8(a)(5) by refusing to meet with the union, or by delaying negotiations, or by refusing to provide information to which the union is entitled, has not thereby demonstrated that he lacks legitimate reasons for resisting the union's demands. In such cases, it might be "punitive," or "arbitrary, unreasonable or capricious," to order the employer to agree to the union's demands. Such a remedy might not be necessary to cure the prior violation, and it would have the unwarranted effect of denying the employer an opportunity to protect his legitimate interests by good faith negotiations.

It is entirely possible to conclude that the Board's order was appropriate in the circumstances of this case (where the employer had only an illegal reason for refusing the requested checkoff) without determining the limits of the appropriateness of this remedy in other circumstances. However, if the Court desires to draw a line there is one which readily commends itself: this Court has recognized in other contexts that the existence of "legitimate and substantial business justifications" is an appropriate touchstone for upholding employer action. E.g., *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 378. Whether the employer in good faith has "legitimate and substantial business justifications" for resisting the union's demands seems an equally relevant inquiry in determining when the Board may remedy refusals to bargain by exacting concessions and/or imposing agreement.

III

We have assumed above that the Board's order exacted a "concession" from the Company. It is not at all self-evident, however, that what was required of the Company here amounted to a "concession" within the meaning of Section 8(d). The Company was required to relinquish its *illegal* reason for refusing the Union's request, but no one, not even the Company, contends that 8(d) protects the right to adhere to illegal positions. Since the Company admits it had no *other* reason for resisting the request, its acquiescence is that request does not constitute a "concession."

ARGUMENT

The Company challenges the Board's order on a single ground: that Section 8(d) precludes the Board from remedying violations by exacting concessions or imposing agreement. This challenge is ill-founded. As we show in Part III, it is doubtful that the Board's order in this case exacted a "concession" within the meaning of Section 8(d). In Parts I and II, we assume that it did, and demonstrate that nonetheless this remedy was within the Board's power.

I. THE BOARD HAS POWER TO REMEDY VIOLATIONS BY EXACTING CONCESSIONS OR IMPOSING AGREEMENT, WHERE THAT REMEDY IS APPROPRIATE IN ALL THE CIRCUMSTANCES OF THE CASE.

A. Section 8(d) Relates to *Whether* a Party Has Bargained in Bad Faith, not to the Remedy Which May Be Devised if He Has.

By its literal terms, as the Company admits (brief, p. 18), Section 8(d) is addressed to a different question than that presented in this case. Section 8(d) defines the obligation to bargain in good faith; it does not purport to define the scope of the Board's remedial power. It states that the

obligation to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession." What this means, at least literally, is that the Board cannot find that an employer has failed to bargain in good faith merely because he "does not . . . agree to a proposal or mak[e] a concession."

And this is not just a literal reading. It is precisely what Congress sought to accomplish when it enacted Section 8(d):

> "[C]riticism of the Board's application of the 'good faith' test arose from the belief that it was forcing employers to yield to union demands *if they were to avoid a successful charge of unfair labor practice.* Thus, in 1947 in Congress the fear was expressed that the Board had 'gone very far, *in the guise of determining whether or not employers had bargained in good faith,* in setting itself up as the judge of what concessions an employer must make and of the counter-proposals that he may or may not make.' H. Rep. No. 245, 80th Cong., 1st Sess., p. 19. Since the Board was not viewed as an agency which should exercise its powers to arbitrate the parties' substantive solutions of the issues in their bargaining, *a check on this apprehended trend* was provided by writing the good faith test of bargaining into Section 8(d) of the Act." *NLRB* v. *Insurance Agents' International Union,* 361 U.S. 477, 486-487.[9]

Section 8(d) "checked . . . this apprehended trend" by precluding the Board from finding an 8(a)(5) violation against an employer who maintains a bargaining position in *good faith* even though, in the Board's view, that position is "unreasonable, or unfair, or impractical, or unsound." *NLRB* v. *Herman Sausage Co.,* 275 F. 2d 229, 231 (5th

[9] Throughout this brief, all emphasis is added unless otherwise indicated.

Cir. 1960). An employer negotiating in good faith may refuse to agree to a proposal, or to make concessions, or indeed, to come to an over-all agreement with the union. The essence of Section 8(d) is that it permits a bargaining impasse arrived at after good faith negotiations.[10]

The classic example of Board transgression of the line drawn by Congress in Section 8(d)—i.e., finding bad faith from a refusal to make concessions—was *NLRB* v. *American National Ins. Co.*, 343 U.S. 395. There the Board found bad faith because, in its view, the employer's demanded management rights clause was too sweeping. This Court held that Section 8(d) precluded such a finding. "Congress provided expressly that the Board should not pass upon the desirability of the substantive terms of labor agreements . . . Accordingly, we reject the Board's holding that bargaining for the management functions clause proposed by respondent was, *per se*, an unfair labor practice." 343 U.S. at 408, 409.

In the instant case, it is clear that the Board did not transgress Section 8(d) *in finding bad faith.* The Board's

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[10] Of course, Section 8(d) *does* require the parties to negotiate with "a desire to reach ultimate agreement, to enter into a collective bargaining agreement." *NLRB* v. *Insurance Agents' International Union*, 361 U.S. 477, 485. An employer may not seize upon the "non-concession" language of Section 8(d) as a "cloak . . . to conceal a purposeful strategy to make bargaining futile or fail." *NLRB* v. *Herman Sausage Co.*, 275 F. 2d 229, 232 (5th Cir. 1960). "Obduracy and obstinacy may be weapons of bargaining, but where they are used not in the interest of bargaining but in its frustration, we cannot give them sanction or refuge. Procrastination and negativity are not components of negotiation . . . The Act requires more than pretense. There is a duty on both sides, though difficult of legal enforcement, to enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement." *Tex Tan Welhausen Co.* v. *NLRB*, — F. 2d —, 72 LRRM 2885, 2887-88 (5th Cir. 1969). An employer is not "immune from condemnation for bad faith because it defines its immediate bargaining tactic as the refusal to agree on one issue." *United Steelworkers* v. *NLRB (Roanoke Iron & Bridge Works)*, 390 F. 2d 846, 850 (D.C. Cir. 1968).

finding of violation was not premised upon any notion that employers must agree to checkoff clauses, or that the failure to do so is itself evidence of bad faith. Rather, the Board made specific findings, affirmed by the Court of Appeals, that the Company was bargaining with subjective bad faith, i.e., with a desire to frustrate reaching agreement. This Court refused to review those findings, 385 U.S. 851, and it is thus settled that in *finding the violation* herein the Board did not contravene Section 8(d).

The Company seeks in this case to make Section 8(d) serve an entirely different purpose. It argues that Section 8(d) absolutely forbids any *remedy* for unfair labor practices which would compel the wrongdoer "to agree to a proposal or . . . mak[e] . . . a concession." The Company admits that the language of Section 8(d) is not addressed to the shaping of remedies (brief, page 18). Nor is there a word in the legislative history, or in any decision of this Court, which suggests that Section 8(d) was intended to restrict the Board's power to remedy violations. Nevertheless, the Company argues that Section 8(d) expresses a "policy of freedom of contract" (brief, page 12); that Section 10(c) authorizes only such remedies "as will effectuate the policies of this Act"; and that, accordingly, the Board may not compel concessions or agreements to remedy violations.

B. In Fashioning Remedies, the Board Must Seek to Effectuate the Policies of "the Entire Act," and the Policies Expressed in Section 8(d) Are Not Entitled to Exclusive Weight.

It is debatable whether Section 8(d) expresses any policy relevant to the fashioning of remedies. Section 8(d) expresses a policy that employers negotiating *in good faith* are to enjoy "freedom of contract," and are not to have that good faith impugned by reason of their unwillingness to make concessions or agreement. It is a big step, however,

and one which finds no impetus in the legislative history, to conclude that Section 8(d) also expresses a policy of insulating employers negotiating *in bad faith* from remedies designed to cure their wrongs. Particularly where, as here, the employer's bad faith consisted of an express purpose to frustrate reaching agreement, and was manifested by repeated refusals to bargain, an imposed "concession" seems wholly unrelated to the "policy" which Congress sought to implement by Section 8(d).[11]

But the Board's power to issue the remedy here should be sustained even if, *as the court below held,* the policy of "freedom of contract" is a relevant consideration in fashioning remedies.[12] Even on that premise, this policy is but one of several policies which must be accommodated in fashioning remedies which effectuate the Act's purposes. The Act also expresses a policy that employers must bargain with "a desire to reach ultimate agreement, to enter into a collective bargaining agreement." *NLRB* v. *Insurance Agents,* 361 U.S. 477, 485. "The Act contemplates the making of contracts with labor organizations. That is the manifest objective in providing for collective bargaining." *Consolidated Edison Co.* v. *NLRB,* 305 U.S. 197, 236. "The declared policy of the Act in §(1) is to prevent, by encouraging and protecting collective bargaining and full freedom of association for workers, the costly dislocation and interruption of the flow of commerce caused by unnecessary industrial strife and unrest." *Virginia Elec. & Power Co.* v. *NLRB,* 319 U.S. 533, 539. And, most pertinent of all, the Act expresses policies about the need for remedies which will undo the

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[11] Note, *Forced Concession as a Possible NLRB Remedy,* 68 Colum. L. Rev. 1192, 1195-1196 (1968); but see Note, *Employer's Refusal to Bargain and the NLRB's Remedial Powers: The H. K. Porter Case,* 35 Chi. L. Rev. 777 (1968).

[12] The court below stated that the Act "is grounded on the premise of freedom of contract . . . and remedies which infringe on it are not to be casually undertaken." (App. 124).

effects of wrongdoing. "[T]he Board has the power to take appropriate steps to the end that the effect of [unfair labor] practices will be dissipated. . . . It cannot be assumed that an unremedied refusal of an employer to bargain collectively with an appropriate labor organization has no effect on the development of collective bargaining. Nor is the conclusion unjustified that unless the effect of the unfair labor practices is completely dissipated, the employees might still be subject to improper restraints and not have the complete freedom of choice which the Act contemplates." *International Association of Machinists* v. *NLRB,* 311 U.S. 72, 82.

If, as we show *infra,* the Board's order in this case effectuates all of these other statutory purposes, the most that can be said on the Company's side is that there is a "tension" between these policies and Section 8(d)'s policy of freedom of contract. *NLRB* v. *Insurance Agents' International Union,* 361 U.S. 477, 486. The Company would resolve that tension by elevating the policy of freedom of contract to an absolute status, to the exclusion of all statutory policies which point in the other direction. That is not, however, the approach which this Court has mandated. On the contrary, this Court has insisted that in fashioning remedies the Board must weigh *all* of the Act's policies, and strike that balance which best effectuates the Act in its entirety. "Surely [the Board] may so fashion one remedy that it complements, rather than conflicts with, another. *It is the business of the Board to give coordinated effect to the policies of the Act.*" *NLRB* v. *Seven-Up Bottling Co.,* 344 U.S. 344, 348. "[T]he advantages of a simple rule must be balanced against the importance of taking fair account, in a civilized legal system, of *every socially desirable factor* in the final judgment . . . *[W]e must avoid the rigidities of an either-or rule.*" *Phelps Dodge Corp.* v. *NLRB,* 313 U.S. 177, 198. This was precisely the approach of the court below: "Where, in a particular case, two policies of the Act conflict, the Board must seek to devise remedies which will

best effectuate the one at least cost to the other. Though ordering an employer to grant a checkoff obviously intrudes on freedom of contract, it may, in certain instances, be the only way to guarantee the workers' right to bargain collectively" (App. 126-127).

These rulings, requiring the coordination of policies in fashioning remedies, are merely one application of an approach which governs all stages in the administration of this Act. As expressed by Mr. Justice Harlan in *Machinists Local* v. *NLRB*, 362 U.S. 411, 418 n. 7, "it is the entire Act, and not merely one portion of it, which embodies 'the definitive statement of national policy.'"

In implementing "the entire Act," this Court frequently has approved remedies which conflict with one of the Act's specific policies. Perhaps the most dramatic examples are those involving orders that an employer bargain with a minority union. No "policy" of the Act is clearer than that an employer may not grant exclusive recognition to a union which represents only a minority of its employees. "Bernhard-Altmann granted exclusive bargaining status to an agency selected by a minority of its employees, thereby impressing that agent upon the nonconsenting majority. *There could be no clearer abridgment of § 7 of the Act . . .*" *Garment Workers* v. *NLRB*, 366 U.S. 731, 737. Yet this Court has repeatedly upheld Board orders requiring an employer to bargain with a minority union as the exclusive representative, where that *remedy* was found by the Board to be the appropriate method of effectuating the policies of "the entire Act." *Frank Bros. Co.* v. *NLRB*, 321 U.S. 702; *NLRB* v. *P. Lorillard Co.*, 314 U.S. 512; *NLRB* v. *Katz*, 369 U.S. 736, 748, n. 16; *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575.[18] In each of these cases, the Court expressly

[18] While *Frank Bros.*, *Lorillard* and *Katz* involved unions which had obtained and then lost majority status, the Court made clear in *Gissel Packing* that in appropriate circumstances the Board may issue a bargaining order even though the union had *never* achieved majority status. 395 U.S. at 613-614.

rejected the argument that the Board's order exceeded its power because it contravened the policy against bargaining with a minority union.[14]

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[14] A fascinating case discussing the "balancing" of policies in fashioning remedies is *Garwin Corp.*, 153 NLRB 664, enforcement denied in relevant part *sub nom. Local 57, Int'l Ladies' Garment Workers' Union* v. *NLRB*, 374 F. 2d 295 (D.C. Cir. 1967), cert. denied 387 U.S. 942. The employer violated Section 8(a)(3) by moving his plant from New York to Florida to escape the union which was the certified bargaining agent. To remedy the violation, the Board ordered the employer to bargain with the union for the Florida employees. The employer challenged the remedy as an unlawful imposition of the union upon the Florida work-force, which had never selected it. The Court of Appeals' majority, in an opinion by Judge Burger, sustained the employer's challenge, finding that the Board's order served *no* policy of the Act. The majority acknowledged, however, that the result might have been different, despite the infringement upon the rights of the Florida employees, if the order had served legitimate policies:

> "Such an infringement of the Florida employees' Section 7 rights might be justified if some rights of the New York workers depended on that balancing or if for some other valid reason the Board considered it necessary to promote industrial peace" (374 F. 2d at 301-302).

Judge McGowan, dissenting, thought that the order *did* serve certain policies of the Act, and that the Board had struck an appropriate balance as between "competing" policies:

> "[O]ur task does not end . . . when we determine that one policy of the Act has been subordinated in some degree to another Congressional purpose. We must go on to decide whether the particular accommodation of such policies made by the Board in response to the particular circumstances of this case fairly falls within the range of the Board's primary authority to effectuate the purposes of the Act . . .
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> * * *
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> ". . . It is the Board's task to employ its acquired expertise in applying the broad policies of the Act to the various situations which may arise. Translating these policies into practical application, with due regard for accommodating their frequently competing implications, necessarily involves exercising a broad discretion" (374 F. 2d at 307, 308).

It should be evident that the "tension" between policy and remedy is greater in the minority union area than in the instant case. Exclusive recognition of a minority union is *unlawful,* yet the Board may command it as a remedy. Making an agreement or concession surely is not unlawful—indeed the Act encourages it even if it does not compel it (Sections 1 and 201 of the Act, 29 U.S.C. §§ 151, 171)—and the Board should be entitled to command it, too, where appropriate as a remedy.

There is nothing surprising about the notion that a wrongdoer may be required to *remedy his wrong* by acts which, but for his wrong, he would not be obligated to perform. The law abounds with examples of such remedies. To cite another instance under the Labor Act: The Act "does not require that the employer permit the use of its facilities for organization when other means are readily available" (*NLRB* v. *Babcock & Wilcox Co.,* 351 U.S. 105, 114) even though the employer uses his facilities to campaign against the union *(United Steelworkers* v. *NLRB,* 357 U.S. 357), yet the Board has held with judicial approval that it can *remedy* violations by imposing precisely such an obligation upon a wrongdoing employer.[15]

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[15] *Montgomery Ward & Co., Inc.,* 145 NLRB 846, enforced on this point 339 F. 2d 889 (6th Cir. 1965) (union given right to address employees on company property if employer addresses the employees); *H. W. Elson Bottling Co.,* 155 NLRB 714, enforced on this point 379 F. 2d 223 (6th Cir. 1967) (same): *J. P. Stevens & Co.,* 163 NLRB 217, enforced on this point 388 F. 2d 896 (2d Cir. 1967), cert. denied 393 U.S. 836 (union given access to company bulletin boards for a one year period); *J. P. Stevens & Co.,* 167 NLRB Nos. 37 and 38, 66 LRRM 1024 and 1030, enforced on this point 406 F. 2d 1017 (4th Cir. 1968) (same): *J. P. Stevens & Co.,* 171 NLRB No. 163, 69 LRRM 1088, enforced — F. 2d —, 72 LRRM 2433 (5th Cir. 1969) (same); *Scott's, Inc.,* 159 NLRB 1795, enforced 383 F. 2d 230, n. 4 (D.C. Cir. 1967) (union given right to address employees on company property).

C. The Board, with Judicial Approval, Frequently Has Fashioned Remedies Which Exact Concessions or Impose Agreement

Indeed, closer to home, the Board frequently has fashioned remedies which interfere with the policy of "freedom of contract," and this Court and the courts of appeals have approved such remedies. Thus the instant case is not the innovation that the Company tries to make it. In order to correct this misconception, we discuss the prior cases at some length.

(1) *Remedying Refusals to Sign*

Section 8(d) expressly requires "the execution of a written contract incorporating any agreement reached if requested by either party." Refusal to comply is, of course, a violation of Section 8(a)(5). *NLRB* v. *Strong*, 393 U.S. 357, 359; *H. J. Heinz Co.* v. *NLRB*, 311 U.S. 514, 523-526.

Recently the Board and the courts have confronted a remedial dilemma: it is not sufficient merely to order an employer to sign an agreement at the end of prolonged litigation, when by that time the agreed-upon period of such an agreement has expired. In *NLRB* v. *Warrensburg Board & Paper Corp.*, 340 F. 2d 920 (2d Cir. 1965), the court fashioned a remedy which solved the dilemma. The parties had agreed upon a contract to run for two years, i.e., until March 1, 1964, but the employer thereafter refused to sign the agreement. The Board, on June 28, 1963, found a violation of Section 8(a)(5), but its finding was not affirmed by the Second Circuit until January 5, 1965 (after the agreement would have expired by its terms). Because an order at that late date to sign the agreement with its original termination date obviously would have been meaningless, the court majority ordered the employer to sign an agreement which would expire at a later date:

"The contract embodying the agreement between

> the Union and Respondent was scheduled to terminate on March 1, 1964. As this date has long since passed, we modify the order of the Board to provide that *the contract shall have a new effective terminal date of September 1, 1965*" (340 F. 2d at 925).

Manifestly the court was rewriting the termination provision of the parties' contract, and imposing upon the employer an agreement for a period to which it had never assented. Nevertheless, the court deemed this necessary lest the absence of such a remedy "encourage purposeful delay in other cases" 340 F. 2d at 923. Judge Moore dissented because "the 'new effective terminal date to be September 1, 1965' as specified by the majority creates by judicial fiat a three-year contract instead of the two-year contract . . . agreed upon by the parties." 340 F. 2d at 926, n. 1.

The Second Circuit's lead was followed by the Board itself, *Schill Steel Products, Inc.*, 161 NLRB 939, and was approved and followed in a unanimous decision of the Fourth Circuit in *NLRB* v. *Beverage-Air Company*, 402 F. 2d 411, 417, n. 5 (4th Cir. 1968). The Fourth Circuit noted that failure to adopt this course "would enable an employer to benefit from his own unfair labor practice." *Ibid.* [16]

(2) *Remedying Untimely Withdrawals from Multi-Employer Units*

It is well settled that multi-employer bargaining is "wholly voluntary", and that an employer who has participated in such bargaining in the past "is free to withdraw from it." *Universal Insulation Corp.* v. *NLRB*, 361 F. 2d 406 (6th Cir. 1966); *NLRB* v. *Sheridan Creations, Inc.*, 357 F. 2d 245 (2d Cir. 1966); *NLRB* v. *Sklar*, 316 F. 2d 145 (6th Cir. 1963). But such withdrawal must be "timely." The Board has held, with judicial approval, that

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[16] Cf. *NLRB* v. *George E. Lightboat Storage Inc.*, 373 F. 2d 762, 770 (5th Cir. 1967).

withdrawal is untimely, and violative of Section 8(a)(5), "once negotiations on a new contract have *started.*" *Universal Insulation, supra,* 361 F. 2d at page 408; *Sheridan Creations, supra,* 357 F. 2d at page 347.

The effect of this rule is that an employer who withdraws from a multi-employer unit after negotiations have *started,* but before a contract has been consummated, will nevertheless be ordered to sign any contract which eventuates from the multi-employer negotiations. That is precisely what was ordered of the employers who withdrew "untimely", albeit prior to the consummation of a multi-employer contract, in a host of decided cases.[17]

In none of these cases had the employer consented to the agreement imposed upon him; indeed, he had withdrawn authority from the multi-employer negotiators before any agreement was reached. Nevertheless, it was deemed appropriate to remedy his violation—untimely withdrawal—by visiting an entire contract upon him.

(3) *Remedying Unilateral Changes*

It is well established that an employer violates Section 8(a)(5) by changing terms and conditions of employment "unilaterally," i.e., without first bargaining with the union thereon. *NLRB* v. *Katz,* 369 U.S. 736; *Fibreboard Paper Products Corp.* v. *NLRB,* 379 U.S. 203. The remedy which the Board has fashioned in such cases is to "restore the *status quo ante*" by requiring the employer to pay during the period following the change the same benefits which had

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[17] *Walker Electric Co.,* 142 NLRB 1213, 1220-1221, 1225; *Cosmopolitan Studios, Inc.,* 127 NLRB 788, enforcement denied for other reasons 291 F. 2d 110 (2d Cir. 1961); *Sheridan Creations, Inc.,* 148 NLRB 1503, enforced 357 F. 2d 245 (2d Cir. 1966), cert. denied 385 U.S. 1005; *Tulsa Sheet & Metal Works,* 149 NLRB 1487, enforced 367 F. 2d 55 (10th Cir. 1966); *John J. Corbett Press, Inc.,* 163 NLRB 154, enforced 401 F. 2d 673 (2d Cir. 1968); *Mor Paskesz,* 171 NLRB No. 20, 68 LRRM 1145, enforced 405 F. 2d 1201 (2d Cir. 1969).

been provided prior to the change. In *Fibreboard Paper Products Corp.*, 138 NLRB 550, 554-555, enforced 322 F. 2d 411 (D. C. Cir. 1963), affirmed 379 U.S. 203, 215-217, the employer had unilaterally contracted out work formerly done by its own employees, and it was ordered to resume performing that work with its own employees and to compensate its employees for work opportunities lost as a result of the contracting out. At least four Courts of Appeals have approved similar remedies.[18]

In each of these cases the employer contended that it had not *agreed* to pay the benefits ultimately ordered, that had it bargained it might have succeeded in accomplishing the change it wanted anyway, and that, accordingly, to require it to make the payments constituted the imposition of an obligation against its will and the exaction of a concession to which it might not have consented in negotiations. For example, the employer's brief to this Court in *Fibreboard* complained that the Board's order:

> ". . . assumes that bargaining would have resulted in abandonment by Petitioner of its plan to contract out work. The Board might with equal justification

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[18] In *Central Illinois Public Service Co.*, 139 NLRB 1407, enforced 324 F. 2d 916 (7th Cir. 1963), the employer unilaterally discontinued a gas discount which it had accorded to its employees, and it was ordered to reimburse employees in the amount of the discount for the period subsequent to its discontinuance. In *United Nuclear Corp.*, 156 NLRB 961, enforced 381 F. 2d 982 (10th Cir. 1967), the employer unilaterally discontinued its severance pay policy, and it was ordered to pay severance pay to those employees who became eligible therefore during the period subsequent to discontinuance. In *Overnite Transportation Co.*, 157 NLRB 1153, enforced 372 F. 2d 765 (4th Cir. 1967), cert. denied 389 U.S. 838, the employer unilaterally reduced wages, and it was ordered to pay the employees the additional amounts which they would have earned but for the reduction. In *Frontier Homes Corp.*, 153 NLRB 1070, enforced on this point 371 F. 2d 974 (8th Cir. 1967), the employer unilaterally altered its seniority practices, and it was ordered to compensate those employees who were laid off contrary to the prior seniority practices.

have assumed that bargaining would have resulted in acceptance by Petitioner of the Union's wage and other demands. There was no . . . warrant for the Board's assumption that bargaining would have resulted in abandonment of the plan to contract out the work . . .

* * *

"As for the Board's assertion that its order imposed no 'undue or unfair burden' on Petitioner, the fact is that it required Petitioner, after the lapse of three years and laboring under . . . recruitment difficulties . . ., to rebuild a supervisory and working force with which to resume, with no prospect of reduced costs, the performance of an operation which had been abandoned as too costly.

". . . The only wrong (if it was a wrong) of which Petitioner was convicted was a refusal to bargain about whether it should let the maintenance work to an independent contractor. All that was necessary to undo that wrong was an orthodox order that Petitioner bargain. The requirement that bargaining be preceded by a resumption of operations which had been abandoned as too costly and by reinstatement with back pay of employees who had been terminated because their services were no longer needed is, we submit, punitive."[19]

The employer (Fibreboard) accurately claimed that the Board's order visited upon it that which the union might not have obtained in bargaining. Surely, this was an intrusion upon the employer's "freedom of contract," and exacted from it a concession which it might not have made had it bargained in good faith. Nevertheless, this Court upheld the Board's order as "well designed to promote the policies of the Act." 379 U.S. at 216.

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[19] Petitioner's Brief, pp. 44-46, in *Fibreboard Paper Products Corp. v. NLRB*, October Term, 1964, No. 14.

(4) ***Depriving the Wrongdoer of the Fruits of Illegal Conduct***

The Board, with judicial approval, has consistently nullified contracts, or contractual provisions, which though lawful on their face were obtained through the commission of unfair labor practices. Each of these cases exacted a "concession" from the employer: he was required to surrender benefits which he had achieved in negotiations. This result is hardly surprising, of course. But it proves our thesis: that while the Board may not interfere with the freedom of contract of an employer negotiating in good faith, it *can* fashion remedies which interfere with the freedom of contract of an employer who negotiates in *bad faith* or who otherwise violates the Act.

In *National Licorice Co.* v. *NLRB,* 309 U.S. 350, the Board found that an employer violated Section 8(5) (the predecessor of Section 8(a)(5)) by ignoring the union and negotiating individual contracts with the employees in which they waived the right to a union-negotiated agreement. The Board ordered the employer to release the employees from all their obligations under the contracts, and this Court enforced the order:

> "Since the contracts were the fruits of unfair labor practices . . . and were a continuing means of thwarting the policy of the Act, they were appropriate subjects for the affirmative remedial action of the Board authorized by §10 of the Act . . . Hence the Board was free by its order to direct that the [employer] should take no benefits from the contracts . . ." 309 U.S. at 361.

In *Virginia Elec. & Power Co.* v. *NLRB,* 319 U.S. 533, the employer checked off dues pursuant to a collective bargaining agreement negotiated with its union and written authorizations supplied by its employees. The Board, finding that the union was employer-dominated, ordered not only dissolution of the union but also that the employer reimburse the employees in the amount of dues which had

been checked off, and this Court affirmed. In a certain sense, *Virginia Electric* and this case are twins. In *Virginia Electric* the Board remedied a violation by exacting the employer's *surrender* of a negotiated checkoff; here, the Board remedied a violation by requiring the employer's *adoption* of a checkoff. In each case, "freedom of contract" was sacrificed to the overriding need to remedy unfair labor practices.[20]

In *NLRB* v. *Borg-Warner Corp., supra,* 356 U.S. 342, the employer insisted that the collective bargaining agreement contain two provisions which ultimately were held to be non-mandatory bargaining subjects.[21] The union negotiators vigorously opposed both of these demands, but the "company's representative made it equally clear that no agreement would be entered into by it unless the agreement contained both clauses." (*Id.* at 347). In view of this impasse, the union struck, but, confronted with the reality that the strike was not succeeding, it ultimately gave in and entered into a collective bargaining agreement containing both controversial clauses. (*Ibid*). Prior to the signing, however, the union had filed unfair labor practice charges with the Board, alleging that the employer's insistence upon these clauses constituted a violation of Section 8(a)(5). The Board so held, and ordered the employer to cease and desist from insisting upon the clauses. (113 NLRB 1289,

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[20] For more recent cases in which the Board remedied unfair labor practices by exacting the surrender of collectively bargained contracts or contract clauses, see *Ice Cream, Frozen Custard Employees,* 145 NLRB 865, 871-872; *Local 80, Sheet Metal Workers,* 161 NLRB 229, 237-238; *The Kroger Co.,* 164 NLRB No. 54, 65 LRRM 1089, 1090-1091, enforced on this point 401 F. 2d 682, 687 (6th Cir. 1968).

[21] (1) A "recognition clause" which excluded, as a party to the contract, the International Union which had been certified by the NLRB as the employees' exclusive bargaining agent and substituted instead the uncertified local affiliate; and (2) a "ballot" clause requiring a secret vote of all employees—union and non-union—on the employer's last contract offer as a precondition to a strike (356 U.S. at 343-344).

1297). This Court, although expressly stating that the clauses sought by the employer were lawful (356 U.S. at 349),[22] nevertheless affirmed the Board's decision *and its order.*

The employer thus was required to surrender the provisions which it had won from the union in the negotiations. Plainly, this was a "concession" exacted from the employer against his will. While the concession in *Borg-Warner* took the form of requiring the employer to *delete* clauses from a contract, whereas, in the instant case, the concession took the form of requiring the employer to *insert* a clause in the contract, the two remedies equally trench upon the employer's "freedom of contract." Surely, to require deletion of contract clauses previously obtained through negotiation is no less an infringement of freedom of contract than requiring the inclusion of a contract clause.

We have shown that, in a variety of circumstances, the Board and the courts have remedied refusals to bargain by exacting a concession from the employer or by imposing upon the employer an "agreement" to which he had not agreed. To be sure, none of these precedents is precisely the same as the instant case. The nature of the violation has differed, and the particular form of concession exacted or agreement imposed has differed. These differences, however, do not refute our central point: that Section 8(d) does not deprive the Board of *power,* in appropriate circumstances, to remedy refusals to bargain by exacting concessions or imposing agreements. That power exists, and in the above cases was found to have been exercised appropriately.

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[22] "Each of the two controversial clauses is lawful in itself. Each would be enforceable if agreed to by the unions. But it does not follow that, because the company may propose these clauses, it can lawfully insist upon them as a condition to any agreement" (356 U.S. at 349).

D. This Court, Fashioning Federal Law under Section 301, Has Subordinated "Freedom of Contract" to Other Policies of the Act Where on Balance That Course Was Deemed Appropriate.

Section 301 of the Act, 29 U.S.C. §185, was enacted simultaneously with Section 8(d). This Court has held that "the substantive law to apply in suits under §301(a) is federal law, which the courts must fashion from the policy of our national labor laws." *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448, 456. Thus, the policy of "freedom of contract" which the Board must respect is equally relevant to the exercise of judicial power under Section 301, and the role which this Court has accorded "freedom of contract" in implementing Section 301 provides a useful insight into the scope of the Board's power under Section 10(c).

This Court has not deemed itself wholly forbidden from exercising its authority under Section 301 to impose contractual obligations upon an employer who has not agreed thereto. In *John Wiley & Sons* v. *Livingston,* 376 U.S. 543, this Court had to decide "whether a corporate employer must arbitrate with a union under a bargaining agreement between the union and another corporation which has merged with the employer" (*Id.* at 544). The Court held "that the disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all rights of the employees covered by the agreement, and that, in appropriate circumstances, present here, the successor employer may be required to arbitrate with the union under the agreement." (*Id.* at 548).

In reaching this conclusion, this Court undertook the same process of "balancing policies" which the court below held the Board was entitled to do in the instant case, and refused to accord exclusive weight to "freedom of contract" (*Id.* at 550):

> "Central to the peculiar status and functions of a collective bargaining agreement is the fact, dictated both by circumstances . . . and by the requirements of the National Labor Relations Act, that it is not in any real sense the simple product of a consensual relationship. Therefore, although the duty to arbitrate, as we have said, . . . must be founded on a contract, the impressive policy considerations favoring arbitration *are not wholly overborne* by the fact that Wiley did not sign the contract being construed."

In *Wackenhut Corp.* v. *International Union, United Plant Guard Workers,* 332 F. 2d 954 (9th Cir. 1964), this Court's decision in *Wiley* was held to require an arms-length purchaser of a business to arbitrate grievances under the seller's collective bargaining agreement. The court explained the result entirely in terms of the balancing of policies (*Id.* at 958):

> "What the Supreme Court did in Wiley was to *balance* the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers against the necessity of affording some protection to the employees covered by a collective bargaining agreement containing an arbitration clause, from a sudden change in the employment relationship. Having in view the objectives of national labor policy reflected in established principles of federal law, the court held the described interest of the employees *outweighs* that of the employer, and must prevail."

All that we contend in the instant case is that the Board —authorized to fashion remedies which effectuate the polices of "the entire Act"—can and should undertake the same balancing of competing policies as this Court has deemed warranted in implementing Section 301. Of course,

it is still necessary to examine whether the particular balance which the Board has struck in the instant case is an appropriate one, and it is to this that we now turn.

II. THE BOARD'S EXERCISE OF ITS POWER WAS APPROPRIATE IN THIS CASE, AND DOES NOT PORTEND "CONTRACT-WRITING" AS A REMEDY GENERALLY

We have shown that Section 8(d) does not deprive the Board of *power* to exact concessions as a remedy. The only remaining question is whether the exercise of that power in this case was appropriate. That is, of course, a very different question, one which the Company does not appear anxious to litigate.[23]

Nevertheless, we feel obliged to discuss this question, and to suggest the dimensions of the Board's right to use this remedy, in order to counter a bit of hyperbole indulged in both by the Company and by the Chamber of Commerce, *amicus curiae*. The Chamber warns that if the Board's power is affirmed in *this* case—which the Chamber admits "obviously warrants the invocation of a strong and effective remedy" (Chamber's brief, page 3)—that power "will no doubt be utilized by the Board to justify even further and more serious intrusions" on freedom of contract *(Ibid)*. "[T]he

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[23] In its principal decision, the court below determined that the Board had the power, and remanded to allow the Board to decide whether the exercise of that power was warranted by the facts of this case (App. 121). On remand, the Board concluded that the remedy "is warranted in the circumstances of this case" (App. 135). The Company thereupon petitioned for review, arguing *only* that Section 8(d) precludes *any* remedy which compels agreement. The Company made no contention that, if the Board had the power in some situations, this was an inappropriate case for its exercise. Likewise, in this Court, the only "Question Presented" by the Company is the broad one, unrelated to the circumstances here, of whether the Board, "has the power to order a party to agree to a substantive provision of a collective bargaining agreement" (Brief for Petitioner, page 3). Thus the Company has made a conscious choice not to contend that the power, if it exists, was exercised inappropriately.

Board may also penalize other employers and unions for other violations of law by requiring that they agree to other substantive contractual provisions" *(Id.*, page 2). The Company similarly warns that "if the Board can order the Company to agree to this contract clause, there is nothing to prevent it from ordering either an employer or a union to agree to contract provisions concerning wage rates, fringe benefits and other terms and conditions" (Brief for Petitioner, page 11).

These fears, of course, are wholly unwarranted. We first show why in this case the remedy is entirely appropriate. We then show that there are protections built into Section 10(c) which assure that affirmance here will not inject the Board into the contract-writing business on a broad scale.

A. In the Circumstances Here, the Board's Remedy Was Appropriate to "Effectuate the Policies of the Act"

The keys to the remedy in this case are the underlying findings of violation. The Board found that the Company's *reason* for refusing the checkoff was "to forestall reaching an agreement with the Union" (App. 50, 135).[24] Furthermore, the Board found not only that this was the Company's reason, but that *by its own admission the Company had no other reason* for refusing to checkoff dues (App. 135; see also App. 30, 32, 36-37). The Board thus was confronted with an employer who (a) was a recidivist, having twice refused to bargain during its first negotiations with the Union; (b) had admitted it had no reason for refusing the Union's request except a reason found unlawful; and (c) who, nevertheless, in response to the Board's second order to bargain, continued to refuse the request, playing "fast and

[24] As Mr. Chief Justice (then Judge) Burger remarked, dissenting in another case, this was the "crucial finding" which justified the Board's conclusion in the instant case that the Company had refused to bargain. *United Steelworkers* v. *NLRB (Roanoke Iron & Bridge Works)*, 390 F. 2d 846, 854 (D.C. Cir. 1968).

loose" with the courts[25] but tendering no lawful reason for its refusal.

In these circumstances, ordering the Company to grant the checkoff was essential to effectuate the policies of the Act. Failure to do so would have made a mockery of the Act. Employers would learn that their statutory obligation to bargain with "a desire to reach ultimate agreement"[26] could be evaded by the simple expedient of remaining mum in the face of a bargaining order, or invoking the talismanic cry that the Board had not, and could not, require the mak ing of a concession.

Unlike the Company, which seems proud of its discovery of a means to render the Act a nullity, the Chamber of Commerce recognizes the force of the Board's reasoning, and acknowledges that these facts "obviously warrant the invocation of a strong and effective remedy" (Chamber's brief, page 3). In the Chamber's view, that remedy should be invocation of the contempt power, which "has long been recognized as the appropriate vehicle for punishing contemptuous conduct and compelling the contemnor 'to do what the law requires of him.'" *(Id.*, page 9). The trouble with this approach is that it begs the question. This Company has painted itself into such a corner that the only way it could purge itself of contempt is by granting a checkoff. On the special facts of this case, that is "what the law requires of it." If the Company must grant the checkoff to purge itself of contempt, the Board can and should order that act directly. "It is obvious that the order of the Board, which, when judicially confirmed, the courts may be called upon to enforce by contempt proceedings, must, like the

[25] As noted in our counterstatement of the case, *supra*, p. 7, the Company told both the court below and this Court that it understood the Court's decree to require that it agree to the checkoff, but when these pleas failed to win review from this Court the Company adopted the opposite interpretation in its dealings with the Union.

[26] *NLRB* v. *Insurance Agents' International Union*, 361 U.S. 477, 485.

injunction order of a court, *state with reasonable specificity the acts which the respondent is to do or refrain from doing.*" *NLRB* v. *Express Publishing Co.*, 312 U.S. 426, 433. "Questions of construction had better be ironed out before enforcement orders issue than upon contempt proceedings." *J. I. Case Co.* v. *NLRB*, 321 U.S. 332, 341. Surely the Board does not lack power to order specifically those acts which, if left undone, will subject the respondent to punishment for contempt.

B. Protections Built into Section 10(c) Assure That The Board Cannot Abuse Its Power

We have shown that the Board's order was appropriate to remedy the violation found in *this* case. It does not follow that, as the Company and the Chamber of Commerce fear, affirmance here will entitle or embolden the Board to make a general practice of exacting concessions to remedy refusals to bargain.

The assurance that the Board will not do so is implicit in Section 10(c) of the Act. The Board is empowered to fashion remedies which "will effectuate the policies of the Act" and that mandate is, indeed, a broad one.[37] It

[37] As recently expressed in *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 216, Section 10(c) " 'charges the Board with the task of devising remedies to effectuate the policies of the Act.' *Labor Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 346. The Board's power is a broad discretionary one, subject to limited judicial review. *Ibid.* '[T]he relation of remedy to policy is peculiarly a matter for administrative competence . . .' *Phelps Dodge Corp.* v. *Labor Board*, 313 U.S. 177, 194. 'In fashioning remedies to undo the effects of violations of the Act, the Board must draw on enlightenment gained from experience.' *Labor Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 346. The Board's order will not be disturbed 'unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.' *Virginia Elec. & Power Co.* v. *Labor Board*, 319 U.S. 533, 540." See also *NLRB* v. *J. H. Rutter-Rex Mfg. Co.*, 38 U.S.L. Week 4067, 4068 (Dec. 15, 1969); *NLRB* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, 610-616; *NLRB* v. *Strong*, 393 U.S. 357, 359; *J. P. Stevens Co.* v. *NLRB* — F. 2d —, 72 LRRM 2433 (5th Cir. 1969).

does not, however, give the Board unfettered license. "[T]his authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices . . . The power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act." *Consolidated Edison Co.* v. *NLRB,* 305 U.S. 197, 235-236. The Board's exercise of discretion in fashioning remedies is "subject . . . to the limitation that its action may not be 'arbitrary, unreasonable or capricious.'" *NLRB* v. *Fansteel Corp.,* 306 U.S. 240, 258.

These limitations effectively assure that, in remedying run-of-the-mill refusals to bargain, the Board cannot dictate the terms of the collective bargaining agreement.[28] For example, the employer who violates Section 8(a)(5) by refusing to meet with the union, or by delaying negotiations, or by refusing to provide information to which the union is entitled, has not thereby demonstrated that he lacks legitimate reasons for resisting the union's demands. In such cases, it might be "punitive," or "aribtrary, unreasonable or capricious," to order the employer to agree to the union's demands.[29] Such a remedy might not be necessary to cure the prior violation, and it would have the unwarranted

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[28] This is not to say, however, that the Board is without power to order compensation to employees for the period *during which the employer has refused to bargain.* See e.g., the "unilateral change" cases discussed *supra,* and the analysis in Part IV, *infra.*

[29] Again, as we discuss in Part IV, it may be appropriate to compensate the employees for the period during which they were unlawfully denied their statutory bargaining rights. Our point is that it would not be appropriate to decree a contract *for the future* without allowing the employer to protect his legitimate interests by good faith negotiations.

effect of denying the employer an opportunity to protect his legitimate interests by good faith negotiations.

What distinguishes *this* case is the Company's acknowledgment on the record that it does not have any legitimate objection to the Union's request. In this case the remedy is necessary to cure the violation, and there is no danger that the remedy might foreclose the advancement by the Company of legitimate reasons for resisting the Union's demands.

Indeed, while we do not believe the Court need mark the outer limits of the Board's power in order to decide this case, there *is* a line which readily commends itself. This court has recognized in other contexts that the existence of "legitimate and substantial business justifications" is an appropriate touchstone for upholding employer action. *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 378; *NLRB* v. *Great Dane Trailers*, 388 U.S. 26, 34; *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 228-229, 235-236. "It is the primary responsibility of the Board . . . 'to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy.'" *Fleetwood Trailer*, 389 U.S. at 378. This Court has noted in such contexts the "delicate task . . . of weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct." *NLRB* v. *Erie Resistor*, 373 U.S. at 229.

These considerations seem equally appropriate to the question of when the Board may remedy refusals to bargain by exacting concessions or imposing agreement. It may not be appropriate for the Board to fashion remedies which foreclose even wrongdoing employers from resisting union demands which they contend in good faith jeopardize "legitimate and substantial" business considerations. On

the other hand, where it is clear that no such considerations are present, a remedy which otherwise effectuates the policies of the Act can hardly be "punitive" or "arbitrary, unreasonable or capricious."

Here, of course, the Company did not have even insubstantial business justifications for its resistance to the Union's request—it had no reason whatsoever except an unlawful desire to forestall agreement. Thus there can be no doubt that this case falls on the side of the line permitting the Board's order.

III. IN ANY EVENT, THE BOARD'S ORDER IN THIS CASE DID NOT EXACT A "CONCESSION."

Thus far, we have assumed (as the Company contends and the court below assumed) that the Board's order exacted a "concession" from the Company. We have shown that, in the circumstances of this case, the Board appropriately could exact such a "concession."

It is not at all self-evident, however, that what was required of the Company here amounted to a "concession" within the meaning of Section 8(d). To be sure, the Company was compelled to relinquish its *illegal* reason for refusing the Union's request, i.e., its desire to forestall agreement. But no one, not even the Company, contends that Section 8(d) vouchsafes the right to adhere to *illegal* positions. And once that reason is denied the Company, it remains by its own admission with no other reason for refusing the request. Does an employer make a "concession" when it agrees to a union demand to which it has no objection?

Neither the legislative history nor the decisions construing Section 8(d) shed light on what constitutes a "concession." But we *do* know that Section 8(d) requires bargaining with "a desire to reach ultimate agreement, to enter into a collective bargaining agreement." *N.L.R.B.* v. *Insurance Agents' International Union,* 361 U.S. 477, 485. It would frustrate that statutory objective, we submit, to treat

as a "concession" an employer's acquiescence in that to which it has no objection. Congress was concerned that employers not be required to "yield . . . positions fairly maintained." *N.L.R.B.* v. *Herman Sausage Co.*, 275 F. 2d 229, 231 (5th Cir. 1960). Lacking a lawful objection to a union's request, an employer has no position to "yield."

An employer would be making a "concession" if forced to yield to a union request which he had resisted because it would increase his costs, impair the efficiency of his operations, reduce his profits, injure his competitive standing, or otherwise conflict with his legitimate business interests. Cf. *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 378; *NLRB* v. *Great Dane Trailers*, 388 U.S. 26, 34; *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 228-229 and see our discussion *supra*, pp. 40-41. But for the employer who lacks any such concern, there is no "concession" to be made.

IV. THE ISSUES IN THIS CASE ARE DIFFERENT FROM THE ISSUES IN THE *EX-CELL-O* CASES PENDING BEFORE THE BOARD

The Chamber of Commerce (brief pp. 12-13) asserts that the outcome of several important cases now pending before the Board, commonly known as the *Ex-Cell-O* cases,[30] will be determined by the Court's decision in the instant case. That assertion is unfounded: the *Ex-Cell-O* cases pose a different legal issue than that presented here.

In the *Ex-Cell-O* cases, the charging parties have asked the Board to fashion a remedy which will compensate employees for their loss of the right to bargain during the period in which their employer refused to bargain with their union. The Board is not being asked to dictate terms of employment for the future, but only to compensate the employees for an injury visited upon them in the past.

[30] See *Ex-Cello-O Corporation* (Case No. 25-CA-2777; *Zinke's Foods, Inc.*, Case No. 30-CA-372; *Herman Wilson Lumber Co.*, Case No. 26-CA-2536; *Rasco Olympia, Inc.*, Case No. 19-CA-3187.

The most that can be said of the similarity between the *Ex-Cell-O* cases and this case is that in each the charging party urged the Board to exercise its discretionary remedial power in an affirmative and more meaningful way in the quest to effectuate the policies of the Act. Indeed, we would hazard a guess that if this Court upholds the Board's order in the instant case, the Chamber will not hesitate to urge that *H. K. Porter* is not binding precedent in *Ex-Cell-O* precisely because of the distinctions we have noted above.

CONCLUSION

For the reasons stated, the judgment of the Court below should be affirmed.

Respectfully submitted,

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